1989

State of Utah v. Edward Thomas Sutton : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, 890155 Plaintiff/Respondent, v. EDWARD THOMAS SUTTON, Defendant/Appellant.	Case No. 890155-CA Priority No. 2

BRIEF OF APPELLANT

Appeal from a judgment and conviction for theft, a third degree felony, in violation of Utah Code Ann. section 76-6-404, and for vehicle burglary, a class A misdemeanor, in violation of Utah Code Ann section 76-6-204, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable David S. Young, Judge, presiding.

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STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court by Utah Code Ann. section 78-2A-3(2)(f) ("appeals from district court in criminal cases, except those involving a conviction of a first degree or capital felony").

STATEMENT OF ISSUES

1. Was the evidence sufficient to support Appellant's convictions?

STATUTES AND CONSTITUTIONAL PROVISIONS

Pertinent statutory and constitutional provisions are set forth in the addendum to this brief.

STATEMENT OF THE CASE

On January 19, 1989, Appellant was convicted of theft, a third degree felony, in violation of Utah Code Ann. section 76-6-404,[1] and of vehicle burglary, a class A misdemeanor, in

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1 Utah Code Ann. section 76-6-404

> A person commits theft if he obtains or exercises unauthorized control over the

violation of Utah Code Ann section 76-6-204[2] (T. 138). On February 17, 1989, Judge Young sentenced Appellant to serve zero to five years in the Utah State Prison, and one year in the Salt Lake County Jail, to run concurrently, and fined Appellant $500, plus a $125 surcharge (Sentencing Transcript 4,5).

STATEMENT OF FACTS

On the evening of October 21, 1988, Charlene Martin was at home (2492 West Robin Road) in the basement, dressing some children after their baths, when she heard a knock on the basement window (T. 48). When she drew the curtain back, she saw Appellant outside gesturing at her (T. 49). She locked up her home, called her brother-in-law, and went outside to lock up the family car (T. 50). Soon thereafter, she went and picked up her husband, Ricky, from work, and they returned home (T. 50-51).

When Ricky got home, he took his family inside and checked the interior of his home, and then went to check on his unlocked pickup truck parked next to the house (T. 59). When he

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property of another with a purpose to deprive him thereof.

2 Utah Code Ann. section 76-6-204

(1) Any person who unlawfully enters any vehicle with intent to commit a felony or theft is guilty of a burglary of a vehicle.
(2) Burglary of a vehicle is a class A misdemeanor.
(3) A charge against any person for a violation of subsection (1) shall not preclude a charge for a commission of any other offense.

opened the truck, he noted that the contents of the truck had been disturbed, but before he was able to take a complete survey, he noticed someone in the vacant lot next to his home, and when he beckoned to him, Appellant came up to Ricky (T. 59-60). Appellant slammed the truck door shut and wiped it with his sleeve, and spoke in an unintelligible manner (T. 61-62). Ricky had his wife call the police (T. 62).

Ricky testified that a tool box and some tools were missing from his truck (T. 62), and a stipulation between the parties established the value of the missing items to be between $250 and $1,000 (T. 95).[3] The next morning, Ricky went to the vacant lot where he first saw Appellant, and Ricky found some "Ricoh" plastic tool wrappers like the ones in his toolbox (T. 70).

Dennis Prisbrey of the West Valley City Police Department responded with Officer Giles to Mrs. Martin's call on October 21, 1988 (T. 85-86, 96). When the officers arrived at the Martin residence, Officer Prisbrey spotted Appellant sitting in the vacant lot next to the Martin home (T. 86-87). Appellant stood and cooperated when Officer Prisbrey approached him and handcuffed him so that the officer could determine if Appellant was "involved" (T. 87). Officer Prisbrey frisked Appellant "for weapons", pulling various pieces of paper and plastic bags from Appellant's pockets (T. 88, 97).

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3 Utah Code Ann. 76-6-412(1)(b)(i) classifies theft of property valued between $250 and $1,000 as a third degree felony.

Officer Giles stated that the bags pulled from Appellant's pockets were marked with the word "Ricoh" (T. 98). Officer Giles was somewhat uncertain if all of the bags he saw came from Appellant's pockets, because there apparently were some debris on the ground prior to Officer Prisbrey's "frisk" of Appellant (T. 103). None of the Ricoh bags were actually taken into evidence (T. 104).

Officer Prisbrey took Appellant and placed him in the patrol car, and went and spoke with Officer Giles and the Martins (T. 89). He then returned to Appellant and read him his Miranda rights (T. 89). It was only after Appellant was driven away in Officer Prisbrey's car that Officer Giles found the toolbox in the vacant field (T. 98).

Appellant testified that on October 21, 1988, he bought two tubes of model glue, and took them and some plastic bags to the vacant lot (which unbeknownst to him was next to the Martin home) to sniff the glue (T. 113). He stated that he saw Mrs. Martin watching him through the window, and explained that what she had interpreted as a gesture was his pushing weeds out of the way as he walked through the lot, and he denied knocking on the Martin basement window (T. 114). He stated that the only time he was near the Martins' truck was when Mr. Martin signalled him to come over by the truck to speak with him, after which Appellant returned to the field to sniff his glue (T. 115). Appellant stated that he did not take the toolbox, and was not even aware of it until a policeman asked him about it (T. 115). Appellant

denied having any "Ricoh" bags in his pockets, but indicated that the police took the plain baggies that he had brought with him out of his pockets and placed them into evidence (T. 115-116).

SUMMARY OF ARGUMENT

In order to support Appellant's convictions, the State had to prove that Appellant intended to deprive the Martins of the toolbox. There was no evidence that Appellant, who was arrested while sniffing model glue, was aware of the toolbox, much less that he intended to deprive the Martins of it. If it were the case that Appellant were trying to deprive the Martins of the toolbox, it is highly improbable that he would remain on their property and voluntarily interact with them and the police, as he did. Further, Appellant made no effort to hide or abscond with the toolbox. Because the State failed to present evidence to support Appellant's convictions, this Court should reverse the convictions and declare Appellant innocent as a matter of law.

ARGUMENT

I.
THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS.

Appellant was convicted of theft, defined by Utah Code Ann. section 76-6-404, as follows:

> A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof[;]

and of burglary of a vehicle, defined by Utah Code Ann. section 76-6-204 as follows:

> (1) Any person who unlawfully enters any

> vehicle with intent to commit a felony or theft is guilty of a burglary of a vehicle.
>
> (2) Burglary of a vehicle is a class A misdemeanor.
>
> (3) A charge against any person for a violation of subsection (1) shall not preclude a charge for a commission of any other offense.

Appellant urges that there was insufficient evidence presented at trial to support his convictions. The standard of appellate review of such a claim of insufficiency of the evidence was explained in State v. Tanner, 675 P.2d 539 (Utah 1983). The court said:

> In reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the verdict and will interfere only when the evidence is so lacking and insubstantial that a reasonable person could not possibly have reached a verdict beyond a reasonable doubt.

Id. at 55Ø. If the evidence is sufficiently inconclusive or inherently improbable, this Court must reverse Appellant's conviction. State v. Petree, 659 P.2d 443, 444 (Utah 1983).

Utah Code Ann. section 76-6-4Ø1 defines "purpose to deprive" (an element necessary to establish theft, and indirectly necessary to establish burglary of a vehicle, which requires an intent to commit theft) as follows:

> (3) "Purpose to deprive" means to have the conscious object:
>
> (a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or
>
> (b) To restore the property only upon payment of a reward or other compensation; or
>
> (c) To dispose of the property under circumstances that make it unlikely that the

owner will recover it.

There was no evidence, either direct or circumstantial, that Appellant intended to deprive Ricky Martin of his toolbox or his tools. This fact demonstrated by comparing the facts of this case with those in State v. Daniels, 584 P.2d 880 (Utah 1978).

Daniels was convicted of theft of an automobile, after he testified that he and a friend had taken a Corvette from an auto dealership, and began driving to California, when they were signalled by the police to pull over, and led the police on a high speed chase culminating in the explosion of the Corvette's engine. When approached by the police, Daniels had no driver's license or registration, and told the police that he owned the Corvette. At trial, Daniels' defense was that he had no intent to permanently deprive the owner of the vehicle's use or value, but intended to use the car for transportation from Salt Lake to California. His claim on appeal that there was insufficient evidence to prove his intent to deprive the owner of the vehicle was rejected by the court because:

> (1) defendant nowhere stated he ever planned to return the automobile to Utah; (2) he travelled at speeds ranging from 100-125 miles per hour when chased by the California highway patrolman, conduct which greatly risked involving the automobile in some kind of mishap which would deprive the owner of its use or benefit; (3) the defendant indicated to the California officer that he owned the Corvette; (4) the defendant by his misuse caused the Corvette's engine to blow out, thereby substantially lessening the vehicle's economic value; and (5) even if defendant's story that he only wanted the vehicle for transportation to California were to be believed, it would have been only a

> possibility that Midvalley Auto would have recovered its stolen automobile in California.

Id. at 883.

In the instant case, Appellant indicated that on the night of his arrest, he was intentionally intoxicated by model glue, and that he was totally unaware that the toolbox was in the vacant lot with him. There was no proof that Appellant took the toolbox from the Martin's truck to the vacant field. The toolbox was not damaged, and Appellant did not make any claim of ownership of the toolbox. He did not seek to evade the police, Mr. Martin, or Mrs. Martin when they interacted with him, nor did he attempt to abscond with the toolbox.

This case also compares favorably with State v. Murphy, 617 P.2d 399 (Utah 1980). Murphy was convicted of receiving stolen property, which again required proof of intent to deprive the owner of stolen property. He was arrested while sleeping in a van belonging to Robert and Raina Robertson, which was parked on the street in Cedar City. When the police inquired, Murphy indicated that a person named Mike had granted permission for Murphy to sleep in the van. Testimony of Murphy's girlfriend was also introduced, which indicated that she and defendant had driven in the van together, and that the van was later parked in a parking lot which adjoined her uncle's apartment and the trailer park wherein the Robertsons (the owners of the vehicle) lived.

The court found that in these circumstances there was

no proof that Murphy intended to deprive the owners of their property, stating as follows:

> We recognize proof of a defendant's intent is rarely susceptible of direct proof and therefore the prosecution usually must rely on a combination of direct and circumstantial evidence to establish this element. However, criminal convictions may not be based upon conjectures or probabilities and before we can uphold a conviction it must be supported by a quantum of evidence concerning each element of the crime as charged from which the jury may base its conclusion of guilt beyond a reasonable doubt.
>
> In the present case, the prosecution has failed to introduce any evidence either circumstantial or direct to establish and prove an unlawful purpose at the time of the defendant's possession of the vehicle.
>
> Under the evidence presented at trial, the defendant drove the vehicle for one evening and then parked it at the address of the registered owners. He did nothing to alter its appearance, impair its future usefulness to the owners or reduce its subsequent economic value. The defendant requested no reward or other compensation for its return and did not dispose of it under circumstances that would make it unlikely the owners would recover it.

Id. at 402-403.

Similarly in the instant case, there was no proof that Appellant intended to deprive the Martins of their toolbox. His mere presence in the vacant lot with the toolbox, which had been left in an unlocked truck next to the lot, fails to establish that he intended to deprive the Martins of their toolbox. When confronted by Mr. Martin and the police, Appellant made no effort to hide the toolbox, and made no effort to bargain with the Martins for a reward in exchange for the toolbox. Nor did

Appellant damage the toolbox.[4]

In these circumstances, no reasonable person could have concluded that Appellant possessed the requisite intent to deprive the Martins of their toolbox - not only was the evidence too inconclusive to affirmatively establish Appellant's intent, but also the evidence that Appellant interacted voluntarily with the Martins and the police while he was in the vicinity of the toolbox makes improbable the assumption that Appellant intended to deprive the Martins of their toolbox.

CONCLUSION

Because the prosecution failed to present sufficient evidence of Appellant's intent to commit the crime of which he was convicted, this Court should reverse Appellant's convictions and declare him innocent of as a matter of law. State v. Petree, 659 P.2d 443, 447 (Utah 1983); State v. Murphy, 617 P.2d 399, 403 (Utah 1980).

Respectfully submitted this 8th day of August, 1989.

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4 At most, the State presented evidence that Appellant had the "Ricoh" tool wrappers in order to facilitate his glue sniffing. Utah Code Ann. section 76-6-412 classifies theft of property of value below $100 as a class B misdemeanor. There was still no evidence of how or where Appellant got the wrappers.

CERTIFICATE OF DELIVERY

I, Elizabeth Holbrook, hereby certify that 8 copies of the foregoing will be delivered to the Utah Court of Appeals and that four copies of the foregoing will be delivered to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah, 84114, this 9th day of August, 1989.

ELIZABETH HOLBROOK

DELIVERED by _____ this ____ day of _____, 1989.

_____

ADDENDUM

CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Ann. section 76-6-204

> (1) Any person who unlawfully enters any vehicle with intent to commit a felony or theft is guilty of a burglary of a vehicle.
>
> (2) Burglary of a vehicle is a class A misdemeanor.
>
> (3) A charge against any person for a violation of subsection (1) shall not preclude a charge for a commission of any other offense.

Utah Code Ann. section 76-6-401

> (3) "Purpose to deprive" means to have the conscious object:
>
> (a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or
>
> (b) To restore the property only upon payment of a reward or other compensation; or
>
> (c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

Utah Code Ann. section 76-6-404

> A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.